

STRAITS SETTLEMENTS REPORTS.

PUBLISHED BY AUTHORITY.

[ORIGINAL CIVIL JURISDICTION]

McELWAINE, C.J.

April 21, 1939.

LEONG LUEN KIEW AND ANOTHER
vs.
THE NEW ZEALAND INSURANCE CO., LTD.
(SINGAPORE SUIT No. 419 of 1938)

Accident Insurance—Burden of Proof.

An accident policy was issued by an Insurance Company which covered death or injury caused by violent accidental external and visible means which independently of any other cause should within 3 calendar months result in certain specified injuries. Following a motor accident an insured person died, the cause of death being shock and haemorrhage from gastric ulcer. It was contended for the Plaintiffs that the accident was the cause of the haemorrhage.

Held, that when an injury has been sustained which comes within the general definition of injury caused by violent and accidental means, it still remains for the claimants to prove that the injury has caused the death in the manner provided by the policy independently of any other cause and that if the claimants cannot discharge that onus their action must fail.

Richard Lim for plaintiffs.

Smith for the defendants.

McElwaine, C.J.—The plaintiffs sue as the administratrix and administrator respectively of Pang Kui, deceased. They claim \$8000 as being due under a comprehensive private motor car policy of insurance issued by the defendants to Messrs. Kwong Hock Cheong Sawmill Co., Ltd.

The policy contained the following added clause which so far as material to this action reads:—

"In consideration of the payment of an additional premium it is hereby understood and agreed that the Company undertakes to pay compensation on the scale provided below for bodily injury as hereinafter defined sustained by Mr. Pang Kui in direct connection with any Motor Car described in the Schedule hereto or whilst mounting into dismounting from or travelling in any Private Motor Car and caused by violent accidental external and visible means which independently of any other cause shall within three calendar months of the occurrence of such injury result in:—

(1) Death Scale of compensation \$8,000
Provided always that:

- (c) No compensation shall be payable in respect of death or injury directly or indirectly wholly or in part arising or resulting from or traceable to (1) intentional self injury suicide or attempted suicide physical defect or infirmity or (2) an accident happening whilst such person is under the influence of intoxicating liquor or drugs.
- (e) Such compensation shall be payable only with the approval of the Insured and directly to the injured person or to his/her legal representative whose receipt shall be a full discharge in respect of the injury to such person.

Subject otherwise to the terms, provisions and conditions of this Policy."

During the continuance of the policy Pang Kui was on the 29th March, 1938, involved in a motor accident in which he suffered injuries. He was removed to hospital where he died on the 6th April 1938. The Kwong Hock Cheong Sawmill Company Limited has approved the payment of compensation under Proviso (e) of the clause above set out.

The dispute in this case is as to whether or not the death of Pang Kui was caused by violent accidental, external and visible means which independently of any other cause resulted in his death. The immediate cause of death was shock and haemorrhage from gastric ulcer.

The plaintiffs say that the deceased's death was caused by the injuries which he sustained, while the defendants say that Pang Kui "did not die from accidental external and visible means which independently of any other cause resulted in death. His death arose from or was accelerated or promoted by a disease or bodily infirmity or natural "cause arising within his system, to wit, gastric ulcer".

The deceased sustained the following injuries in the motor accident:—

- (1) Lacerated scalp wound 3½" left frontal region.
- (2) Abrasions right leg and right hip.
- (3) Fracture alveolar margin.

On admission to hospital he was also found to be suffering from severe diabetes and hardened arteries but these diseases were not caused by the accident.

On the 3rd April the right leg was slightly septic. Dr. Chew who attended the deceased said

that this septic abrasion was less than half a square inch in area, was quite superficial and shewed no sign of spread. The septic condition was healed on the 4th April and on that day the deceased was regarded as being out of danger. At 2.55 p. m. on the 6th April Pang Kui suddenly became much worse and he died at 3 p.m.

An autopsy disclosed a moderately enlarged heart with flabby brown muscle which Dr. Chew described as serious heart disease. The two coronary arteries shewed marked hardening and thickening. There was a gastric ulcer of long standing. It was deep penetrating the wall of the stomach, and adhered to the surface of the pancreas. There was a blood clot adherent to an eroded blood vessel in the base of the ulcer. There was small subarachnoidal haemorrhage in both parieto occipital regions of the brain but this was not in itself serious.

The case for the plaintiffs was that the shock of the accident, the haemorrhage of the brain and the sepsis of the leg combined in aggravating the gastric ulcer and in causing the eroded blood vessel in the base of the ulcer to burst and thus cause death. The case for the defence was that the bursting of this blood vessel was due to the gastric ulcer aggravated perhaps by the diabetes condition and by the heart and artery trouble.

Two medical witnesses were called for the plaintiffs and one for the defendants. The effect of the evidence for the plaintiffs was that the bursting of the blood vessel at the base of the gastric ulcer might have been caused or accelerated by the injuries sustained in the motor accident while Dr. Chew who gave evidence for the defence thought it improbable that the accident had anything to do with the bursting of this blood vessel. This witness mentioned that the deceased was an opium addict. There was in evidence a chart shewing the deceased's temperature and pulse from the 30th March to the 6th April. The temperature which was above 100 degrees on the 30th fell to 99 degrees on the 31st and to 98 degrees on the 1st April. It rose to above 99 degrees on the 2nd but fell that evening and remained about normal for the remainder of the patient's life. None of the medical witnesses appears to attach much importance to the temperature but Dr. Chew said that a rise in temperature would tend to an acceleration in pulse.

Professor Munro in his evidence stated that the average pulse is 72. The deceased's average recorded pulse was 113 on the 30th March, nearly 98 degrees on the 31st, 85 on the 1st April, 113 on the 2nd, 103

on the 3rd, 111 on the 4th and 5th and 120 on the 6th.

I think there was no disagreement in the medical opinion that this rapid pulse might be associated with some inflammatory process or bleeding or with the septic condition of the leg or with the injuries or the diabetes or arterial or heart disease. Now on the 4th the leg was no longer septic and he had so far recovered from his injuries that he was regarded as out of danger. This leaves as possible causes of the high pulse on the 4th, 5th and 6th, the diabetes, the arterial disease, the heart disease or the possible consequences of the sepsis or possible internal bleeding.

I fully accept Professor Munro's opinion that it is possible for external sepsis or subarachnoidal haemorrhage from an injury to the brain to cause bleeding in an ulcerated stomach or to cause a blood vessel adjacent to a gastric ulcer to burst. But Professor Munro was careful to say that these are not common consequences of external sepsis or of subarachnoidal haemorrhage. Indeed, he said that it is uncommon for a septic wound to aggravate an ulcer already in existence. It does not follow from the fact that the leg was no longer septic at death that the sepsis had not already wrought the internal damage which is possible though uncommon.

The witnesses agree that sepsis is more destructive and rapid in its spread in a diabetic patient than in a healthy person. The rapid healing of the slight sepsis on the abrasion on the leg which Dr. Chew said was superficial and shewed no sign of spread notwithstanding the fact that the patient was diabetic, appears to me to lessen the possibility of the sepsis having contributed to the bursting of the internal blood vessel.

Professor Munro was impressed by the fact that death ensued so soon after the accident. His words were "It would be a coincidence if this man died of ulcerative haemorrhage a week after an accident unless the two were casually related". He said it was difficult to be certain of any one cause of bursting of the blood vessel but thought it likely to have been due to a combination of several causes such as the arterial trouble, the diabetes and the injuries received in the accident. No evidence was given as to when the blood vessel was likely to have burst so the fact that the post mortem examination revealed a blood clot adherent to the eroded blood vessel is one from which I can draw no inference. The suddenness with which the patient became much worse five minutes before his death may be some indication that the blood vessel burst very shortly before death. On the other hand,

the high pulse may be an indication of internal bleeding as early as the 4th April, but it may also have been due to the heart disease and diabetes.

I find that the accident and the resultant shock, sepsis and subarachnoidal haemorrhage were possible causes of the bursting of the eroded blood vessel in the base of the ulcer but I am not satisfied that they in fact caused this diseased blood vessel to burst.

The matter remains in doubt.

"When an injury has been sustained which comes within the general definition of injury caused by violent and accidental means, it still remains for the claimant to prove that the injury has caused the death in the manner provided by the policy" (*Macgillivray* 2nd Ed. 1134)—independently of any other cause. That onus the plaintiffs have not discharged.

This finding should suffice to dismiss the action, but in case an appellate court should hold that accepting as I do Mr. Munro's evidence, I should have found that the plaintiffs have established a probability that the accident with its consequential sepsis, cerebral haemorrhage and shock caused the rupture of the blood vessel and that this rupture was not caused by the action of the diabetes, heart disease and hardened arteries on the weakened blood vessel, it becomes necessary to consider the effect of the words of the policy "independently of any other cause".

The accident certainly did not cause the gastric ulcer and it was from the gastric ulcer that this man died.

To come within the policy it must be shewn that violent accidental, external and visible means independently of any other cause resulted in death.

The meaning of almost identical words was considered in *Fidelity and Casualty Company of New York v. Mitchell* (1917) A.C. 592 where Lord Dunedin said:

"Now the expression 'other causes' postulates a cause already specified. The word 'cause' has not, so far, been used in the sentence, and it must therefore be found in the words 'accidental means'. Therefore there must be independency between 1 (the accident) and cause 2, whatever that may be".

The words 'accidental means' are not used in the clause before me, but I think the meaning of the clause is the same as in the *Mitchell* case. Before the defendant is liable, death must have resulted from the motor accident independently of the gastric ulcer.

The facts in *Mitchell's* case and in *In re Etherington and the Lancashire and Yorkshire Insurance Company* (1909) 1 K.B. 591 to which I was also referred and in the very recent case of *Smith v. Cornhill Insurance Company, Limited* 54 T.L.R., 869 shewed that the disease or immediate cause of death—shock in *Smith's* case—were dependent consequences of the accident. I was referred to no case in which death was due to accident operating on an already diseased body except *Cawley v. The National Employees' Accident and General Assurance Association Limited* 1 T.L.R. 255 which related to a policy which expressly excluded liability for death "arising from or accelerated or promoted by any disease or bodily infirmity, or any natural causes arising within the system of the assured whether accelerated by accident or not". The assured had an accident—a fall which dislodged a gall stone from the gall bladder into the common gall duct which induced peritonitis from which the assured died. To Mr. Justice A. L. Smith's mind "the evidence went to shew that the assured's death did not result 'directly and solely from external and material causes visibly operating upon the person of the assured'. It appeared to him that if the deceased had not suffered from gall stone the accident would not have caused death".

Death need not be a natural and probable result of an accident to make the insurance company liable if the death is in fact the result of the accident. *Dunham v. Clare* (1902) 2 K.B. at 296.

The accident must be the proximate cause of death.

I have no doubt that in *Cawley's* case the dislodgment of the gall stone, the peritonitis and the death were successive results of the fall though the fall not having brought the gall stone into existence was not the sole cause. The policy clearly exempted the company.

If in the case before me the accident resulted in cerebral haemorrhage or sepsis and if the haemorrhage or sepsis so increased the blood pressure or so weakened the eroded blood vessel that it burst and caused death, there would be a complete chain of cause and effect connecting the motor accident with Pang Kui's death.

Had the defendant Company, what Vaughan Williams L. J. called "the commercial courage", to exempt themselves from liability by the terms of the policy?

Any ambiguous clause in the policy must be construed against rather than in favour of the Company. *Etherington's* case (*supra*). But I think there is no ambiguity.

Proviso (d) is clear. "No compensation shall be payable in respect of death directly or indirectly, wholly or in part resulting from physical defect or infirmity."

If the phrase "independently of any other cause" gives this policy the same meaning as the policy expressed in different words and with great precision in *Cawley's case*, then an assured person with some bodily disease which is fatally aggravated as a direct result of an accident, has very little protection under such a clause.

To my mind the clause in the present case and the clause in *Cawley's case* have very much the same meaning. If the disease is the proximate cause of the death, then the death is not caused by the accident independently of the disease. See *Coxe v. Employers' Liability Assurance Co., Ltd.*, (1916) 2 K.B. at 634.

There appears to be very little English authority on the point. *Macgillivray* on Insurance Law 2nd Ed. at p. 1135 says:

"Where the assured is suffering from some disease contracted independently, that is to say not arising as a natural consequence of an accidental injury, it is often extremely difficult to determine whether or not the injury is the sole cause of death or disability. Death or disability may be partly the consequence of disease."

At page 1136 he refers to an American case to the report of which I have not access, in which it is stated that where an assured's kidney was in a cancerous condition and consequently more liable to rupture than a healthy kidney would be, and the assured fell against a table and ruptured his kidney causing haemorrhage and death, there was no liability if a healthy kidney would not be likely to have ruptured by the same accident. "A healthy kidney might not have ruptured, yet the rupture was clearly caused by violent and accidental means and the rupture was the sole proximate cause of death. The disease was a cause contributing to the injury, but once the injury was caused it (i.e. the disease) was not a contributing cause of death unless it could be shewn that a healthy kidney would have recuperated from the rupture". And at page 1137 he gives another example:

"The fourth class of case is that where there is previous disease and the assured meets with an accident, which results in no separate and distinct injury but merely aggravates the complaint from which the assured is already suffering and death or disability results, as where the assured

was suffering from inflammation of the liver, and a fall resulted in acute inflammation of which he died; and in another case where the assured was suffering from a reducible hernia and an accidental lurch of a railway train aggravated the hernia and caused it to become strangulated, resulting in death. In these cases the proximate cause of death was disease which was aggravated by accidental means, and therefore an injury caused by violent and accidental means was not the sole cause of death."

Welford's Accident Insurance 2nd Ed. at p. 183 says:

"Where the peril insured against, though undoubtedly causing the loss, is preceded in point of time by an excepted cause, there is no loss within the meaning of the policy of the excepted cause which can be regarded as its proximate cause."

I take "independently of any other cause" to make any cause other than the motor accident to be an excepted cause.

I think *Leyland Shipping Company, Limited v. Norwich Union Fire Insurance Society Limited* (1918) A.C. 350 a good illustration of proximate cause. The question was what was the proximate cause of the loss of the "Ikaria". The ship had been torpedoed on the 30th January, but got into port. She was anchored inside a breakwater but as she was down by the bow in consequence of the damage done by the torpedo at each low tide she took the ground while the rest of her structure was waterborne. She was thereby subjected to considerable strain and the bulkhead between No. 1 and No. 2 holds having been weakened by the explosion of the torpedo, the forward end crumpled up and she became a total loss on the 3rd February. It was held that the torpedoing and not the stranding was the proximate cause of the loss of the ship and that the defendants who had not insured against war risks were not liable.

The torpedoing was to the grounding what the gastric ulcer was to the motor accident—the torpedoing and the gastric ulcer were each the proximate cause.

I am therefore of opinion that even if the accident and its natural *sequelae* contributed to the assured's death as the plaintiff alleges the accident did not result in death "independently of any other cause" but because of another cause the weakened condition of the blood vessel due to the assured's diseased condition.

There was not "independency between cause 1 (the accident) and cause 2" the diseases from which the assured was suffering, and the defendant would not be liable even if proviso (d) were omitted.

On this ground too the action fails and is dismissed with costs.

Action dismissed.

Solicitor for plaintiff—R. C. H. Lim.

Solicitors for defendants—

Donaldson & Burkinshaw.

ORIGINAL CIVIL JURISDICTION

MANNING, J.

May 18, 1939.

RE P. K. KASSIM SERANG

(SINGAPORE BANKRUPTCY No. 41 of 1939)

Bankruptcy—Refusal to make Receiving Order—“Sufficient cause”—Sub-contractor for labour—Probability of Debtors earning capacity being destroyed—Antecedent examination of Debtor on Judgment Summons—No other creditors—Bankruptcy Ordinance (Cap. 45), sect. 6 (3)—Civil Procedure Code sect. 658 seq.—Labour Ordinance (Cap. 69), sects. 42, 96.

The Petitioning-Creditor, a former foreman of works employed by the Debtor, having recovered judgment against him in February 1938 in the District Court for unpaid wages, then garnished certain moneys due to the Debtor; but these moneys were by consent ordered by the District Court in September 1938 to be paid out to the Controller of Labour for distribution *pari passu* among certain labourers, on whose behalf the Controller had also recovered judgment against the Debtor under the Labour Ordinance (Cap. 69). The balance due to such labourers upon the latter judgment had then been paid off by the Debtor himself by small instalments. The Petitioning Creditor had then taken out a judgment-summons against the Debtor under sect. 658, Civil Procedure Code, and the District Court at the conclusion of the examination thereunder on the 1st November 1938 had made no order. The Petitioning creditor then, in January 1939, served the Debtor with a Bankruptcy Notice, and that not being complied with, in April 1939, with a Bankruptcy Petition. The Debtor did not deny the allegations in the Petition, but, by affidavit made jointly by himself and his brother-in-law (who was also the Petitioning Creditor's uncle) alleged that he had no property nor expectation of any, and no creditors but the labourers that he was bound to employ for execution of his contracts, and that the making of a Receiving Order would prevent his obtaining any further contracts or recruiting any labourers. He had offered to pay the Petitioning Creditor by small instalments, but his offer had been declined.

Held, that a Receiving Order would destroy the assets of, and entail hardship to, the Debtor, and there was therefore “sufficient cause” within the meaning of sect. 6 (3) of the Bankruptcy Ordinance for not making such order.

In re Otway (1895) 1 Q.B. 812: In re Betts (1897) 1 Q.B. 50; In re Emma Somers (1897) 4 Mans. 227: re Seah Peng Leat, (1939) Mal. L.J., 67, followed.

Creditor's Bankruptcy Petition, alleging as “an act of bankruptcy” the Debtor's failure to comply with the requirements of a Bankruptcy Notice which was served on him the 25th January 1939 and was founded on a District Court Judgment dated the 12th February 1938 awarding him \$129, for wages as “Serang” or foreman of works employed by the Debtor, and \$20.75 for costs.

The Debtor did not dispute the allegations in the Petition, but prayed that no order be made thereon, because the history of events since the date of the judgment, as deposed to in his and his brother-in-law's joint-affidavit filed the 10th May 1939, as follows, constituted “sufficient cause,” under sect. 6 (3), Bankruptcy Ordinance (Cap. 45).

“And first I, the said P. K. Kassim Serang for myself say that—

1. “I am aged 36 years, and have a wife and child.
2. “The Petitioning Creditor's judgment dated the 12th February 1938, referred to in paragraph 2 of the Bankruptcy Petition, was in respect of wages as my “serang,” or foreman, in a pile-driving sub-contract at North Boat Quay, Singapore. In pursuance of the said judgment, he garnished certain moneys (about \$110) due to me by Messrs. Seng Hup & Co. of No. 307 Tanjong Pagar Road. The Extra Assistant Controller of Labour, on the other hand, claimed the said moneys on behalf of 46 of my labourers for whom he had recovered judgment on the 24th August 1938 in District Court Summons No. 2584/1938 for \$184.97. At the trial of an Interpleader issue on the 10th September 1938, the learned District Judge by consent ordered the said \$110 in Court to be paid out to the said Extra Assistant Controller of Labour for distribution rateably among the said 46 labourers by virtue of their priority under sects. 42 and 96, Labour Ordinance (Cap. 69).
3. “I have thereafter with the assistance of my brother-in-law, the Second Deponent, paid off piece-meal the balance \$74.97 due to the said labourers.
4. “On the 4th day of October, and 1st day of November, 1938, the Petitioning Creditor examined me on a judgment-debtor Summons (No. 611) founded upon his judgment aforesaid: and the said District Judge, after hearing the evidence, was pleased to make no order thereon.
5. “I have no assets, nor expectation of any, other than what little I can earn from undertaking occasional sub-contracts for the supply of labour to building contractors. The profit, if any, on such sub-contracts is